(2)

No. 05-1435

Supreme Court, U.S.
FILED
JUL 27 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

JETT J. MASON, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Fifth District Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record:
SCALA D. BYERS –
SBOT No. 03554020
P.O. Box 496721
Garland, Texas 75049-6721
Phone: 1/866/255-9795

Counsel for Respondent Jett Jarvis Mason, Jr.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether a statement made in response to police interrogation, the primary purpose of which was to establish or prove past events potentially relevant to a later criminal prosecution, was testimonial?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
COUNTER-STATEMENT OF THE CASE	1
A. The Alleged Assault	1
REASONS TO DENY THE PETITION	2
I. This Case Does Not Merit Certiorari Because The State Court Decided An Important Federal Question That Has Since Been Settled By This Court	2
A. *Crawford v. Washington*	3
B. *Hammon v. Indiana* And *Davis v. Washington*	7
1. The *Davis* Case	8
2. The *Hammon* Case	10
C. The SOT Contentions	12
1. The Procured Statements In *Mason* Are Testimonial Because They Were Obtained During An Interrogation By A Police Officer And Recounted Past Events	13
a. The "Cry For Help"	16
b. Excited Utterance	16

TABLE OF CONTENTS – Continued

Page

2. The State Court Did Not Ignore The Circumstances Surrounding The Taking Of The Statements When It Found The Statements Were Made Under Circumstances Which Would Lead An Objective Witness Reasonably To Believe That The Statement Would Be Available For Use At A Later Trial 17

a. The Significance Of The Excited Utterance..... 18

b. The Cry For Help And The Dynamics Of Domestic Violence 19

II. Review Should Also Be Denied Because The Fifth District Court Of Appeals Reached The Correct Result On The Facts Of This Case..... 20

A. The Lower Court Correctly Held The Statements In This Case Were The Product Of Interrogation And Were Made Under Circumstances, Objectively Considered, That Would Lead An Objective Witness To Reasonably Believe The Statement Would Be Available For Use At A Later Trial..... 20

III. Review Should Also Be Denied Because *Davis* Has Provided Significant Guidance In The **Sixth Amendment** Analysis In This Area Of The Law 23

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page

CASES

Anderson v. State, 111 P.3d 350 (Alaska Ct.App. 2005) 7

Crawford v. Washington, 531 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ..... *passim*

Davis v. State, 169 S.W.3d 660 (Tex.App. – Austin 2005, *no pet.*) 3

Davis v. Washington, ___ U.S ___, 126 S.Ct. 226 (2006) ..... *passim*

Hammon v. Indiana, ___ U.S ___, 126 S.Ct. 226 (2006) ..... *passim*

Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) 9

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2540 (2005) 7

Lee v. State, 143 S.W.3d 565 (Tex.App. – Dallas 2004, *pet. ref'd*) 5

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) 14

Lopez v. State, 888 So.2d 693 (Fla.Dist.Ct.App. 2004) 7

Mason v. State, 173 S.W.3d 105 (Tex.App. – Dallas 2005, *pet. ref'd*) 5, 13, 18, 19

Moody v. State, 594 S.E.2d 350 (Ga. 2004) 7

Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1936 (2005) 7

TABLE OF AUTHORITIES – Continued

Page

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) 3

People v. Corella, 18 Cal. Rptr. 3d 770 (Cal.Ct.Rptr. 2004) 7

People v. Mackey, 785 N.Y.2d 870 (New York Crim.Court 2004) 7

People v. Moscat, 3 Misc.3d 739, 777 N.Y.S.2d 875 (New York Crim.Court 2004) 3

People v. Victors, 819 N.E.2d 311 (Ill.App.Ct. 2004), *appeal denied*, 830 N.E.2d 8 (Ill. 2005) 7

People v. West, 823 N.E.2d 28 (Ill.App.Ct. 2005) 7

Pitts v. State, 612 S.E.2d 1 (Ga.Ct.App. Jan. 24, 2005) 7

Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) 6

Rogers v. State, 814 N.E.2d 695 (Ind.Ct.App. 2004) 7

State v. Byrd, 828 N.E.2d 133 (Ohio Ct.App. 2005) 7

State v. Green, 874 A.2d 750 (Conn. 2005) 7

State v. Hembrett, 696 N.W.2d 473, 269 Neb. 840 (Neb. 2005) 7

State v. Reed, 280 Wis.2d 68, 695 N.W.2d 315 (Wis. 2005) 15

United States v. Arnold, 410 F.2d 895 (6th Cir. 2005) 7

United States v. Brito, 427 F.3d 53 (1st Cir. 2005) .. 17, 23

United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Cromer, 389 F.2d 662 (6th Cir. 2004) 5

United States v. Stewart, 433 F.2d 273 (C.A.2 2006) 15

Wall v. State, 184 S.W.3d 730 (Tex.Crim.App. 2006) 17, 23

CODES

TEX.PEN.CODE 37.08 12

RULES

TEX.R.EVID. 803 3

CONSTITUTION

U.S. CONST. VI AMENDMENT ..... *passim*

OTHER AUTHORITIES

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 5

BRIEF IN OPPOSITION

The respondent, Jett Jarvis Mason, Jr. ("Mason"), submits this brief in opposition to the State of Texas' ("SOT") petition for a writ of certiorari.

OPINION BELOW

Mason does not object to the SOT recitation of the court proceedings below.

COUNTER-STATEMENT OF THE CASE

A. The Alleged Assault

On July 6, 2002, at 7:24 p.m., Sergeant Donald Blasingame, a police officer with the Seagoville Police Department, and the State's sole witness at trial, received a dispatch and responded to a 911 disturbance call at a residence in Seagoville, Texas. Blasingame knocked on the door of the residence and Sarah Henderson answered the door. Blasingame described Henderson's demeanor as upset, crying and mad; he noted redness and the beginning of swelling around Henderson's nose and mouth. (RR 2 p. 10)[1] In response to Blasingame's question about why she had called the police, Henderson, who did not testify at the trial, told Blasingame she and Mason were asleep when Mason's cell phone began ringing. When Henderson woke Mason to answer the phone, he slapped her. Henderson told Mason, "You slapped me." Mason then shoved her

[1] RR refers to the Reporter's Record of transcribed trial proceedings followed by the volume number, page number and line numbers.

off the bed, put his hand on her neck and said he would kill her. Henderson told Mason she was calling the police and did so[2]. (RR 2 p. 11)

In response to police questioning, Henderson told Blasingame she and Mason had not been arguing or fighting before the alleged assault (RR 2 p. 51) and had been getting along okay. (RR 2 p. 24) Further, Blasingame did not observe blood, torn clothing or any signs of a struggle inside the home. (RR 2 p. 42)

After questioning Henderson, Blasingame questioned Mason in the bedroom. He found Mason sitting on the bed and appearing to have been asleep. (RR 2 p. 43) Blasingame questioned Mason about the events of the evening (RR 2 p. 14); Mason told Blasingame he had accidentally hit Henderson when he reached for the phone. (RR 2 p. 37-38) Mason was arrested at 7:37 p.m. and charged with misdemeanor family violence assault.

REASONS TO DENY THE PETITION

I. This Case Does Not Merit Certiorari Because The State Court Decided An Important Federal Question That Has Since Been Settled By This Court.

The Court exercises its discretion to grant certiorari only when a state court has decided an important federal question that has not been, but should be, settled by this Court. Sup. Ct. Rule 10(c). Because the issues in question

[2] There was no evidence of the content of the 911 call introduced at trial other than such a call was made.

were decided by this Court after the SOT filed its writ of certiorari, no legal issue is presented worthy of certiorari.

A. *Crawford v. Washington*[3]

Mason is a domestic violence case in which the complainant did not testify. Because many complainants in domestic violence cases refuse to cooperate with prosecutors, or recant their previous, inculpatory statements, prosecutors, through the use of the excited utterance exception to the hearsay rule[4] and ***Ohio v. Roberts***[5], fashioned a "victim-less" prosecution. ***Davis v. State***, 169 S.W.3d 660, 671 (Tex.App. – Austin 2005, *no pet.*) *citing* ***People v. Moscat***, 3 Misc.3d 739, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Court 2004)

The approach proliferated throughout the country. The ***Roberts*** application allowed the admission of testimonial statements through a third party, no personal knowledge of the events to which they testified, without an opportunity by a criminal defendant to test the reliability of the statements through cross-examination. Many times, as is the case here, the testimony admitted as an excited utterance was the ***only*** testimony concerning the elements of the charged offense.

Crawford overruled ***Roberts*** with regard to testimonial statements and stated:

> **"We readily concede that we could resolve this case by simply reweighing the "reliability**

---

[3] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

[4] 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)

[5] **TEX.R.EVID. 803(2)**

> **factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion ... The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising."**

Crawford v. Washington, 124 S.Ct. at 1373.

The ***Crawford*** Court reached two conclusions about the meaning of the **Sixth Amendment**: (1) the Court noted the principal evil at which the Confrontation Clause was directed was the civil law use of ex parte examinations as evidence against the accused. ***Crawford v. Washington,*** 124 S.Ct. at 1363; and (2) the Framer's of the Constitution would not have allowed admission of testimonial statements of a witness into evidence who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity to cross-examine the witness. ***Crawford v. Washington,*** 124 S.Ct. at 1365. The Court noted the unpardonable vice of the ***Roberts*** test was its demonstrated capacity to admit core testimonial statements the Confrontation Clause plainly meant to exclude. ***Crawford v. Washington,*** 124 S.Ct. at 1372.

The core holding of ***Crawford*** is that the Confrontation Clause of the **Sixth Amendment** is a rule of procedure, not of evidence. If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers

a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements. ***United States v. Cromer***, 389 F.3d 662, 679 (6th Cir. 2004).

With these principles in mind, the ***Crawford*** Court stated the Confrontation Clause applies to witnesses against the accused – in other words, those who bear testimony[6] – and set out a non-exhaustive list of what, at a minimum, are testimonial statements: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford v. Washington,*** 124 S.Ct. at 1364. Statements taken by police officers in the course of interrogations are also testimonial. ***Id.***

Crawford did not specifically define interrogation in the **Sixth Amendment** context but the Court did explain explicitly what it is not. The Court used the term "interrogation" in its colloquial[7], rather than any technical, legal sense. ***Mason v. State***, 173 S.W.3d 105, 108 (Tex.App. –

---

[6] ***Crawford v. Washington***, 124 S.Ct. at 1364.

[7] Colloquial means "used in or characteristic of conversation, especially familiar and informal conversation." ***Lee v. State***, 143 S.W.3d 565 (Tex.App. – Dallas 2004, *pet. ref'd*) *citing* **WEBSTER'S THIRD NEW INT'L DICTIONARY 446 (1981)**

Dallas 2005, *pet. ref'd*) *citing* ***Crawford v. Washington***, 541 U.S. at 53 n.4 (comparing ***Crawford*** facts to ***Rhode Island v. Innis***, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980))

Also included within the class of testimonial statements are statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. ***Crawford v. Washington***, 124 S.Ct. at 1364. The Court explained:

> **"It applies to "witnesses" against the accused – in other words, those who bear testimony. 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony", in turn is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact". *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."**

Id. at 1364.

After ***Crawford***, lower courts set about the task of determining whether out-of-court statements were testimonial. A majority view emerged, (which the SOT advances before this court), which held that statements obtained during the initial police-complainant interaction at the scene of a crime were not testimonial for purposes of

the **Sixth Amendment** even if the statements were made in response to police questioning[8].

B. *Hammon v. Indiana*[9] and *Davis v. Washington*[10]

On June 19, 2006, the Court issued its opinion in ***Hammon*** and ***Davis*** deciding when statements made to law enforcement personnel at a crime scene, and during a 911 emergency call, are testimonial and thus subject to the requirements of the **Sixth Amendment**'s Confrontation Clause. This Court held:

> **"Statements are nontestimonial when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and**

---

[8] *See, e.g.*, ***Mungo v. Duncan***, 393 F.3d 327, 336 n.8 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1936 (2005); ***Leavitt v. Arave***, 383 F.3d 809, 830 n.22 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2540 (2005); ***Anderson v. State***, 111 P.3d 350, 354-55 (Alaska Ct.App. 2005); ***People v. Corella***, 18 Cal. Rptr. 3d 770, 776 (Cal.Ct.Rptr. 2004); ***State v. Green***, 874 A.2d 750, 775-76 (Conn. 2005); ***People v. West***, 823 N.E. 2d 28, 36-37 (Ill.App.Ct. 2005); ***Rogers v. State***, 814 N.E.2d 695, 701-02 (Ind.Ct.App. 2004); ***State v. Hembrett***, 696 N.W.2d 473, 269 Neb. 840, 851-52 (Neb. 2005); ***People v. Mackey***, 785 N.Y.2d 870, 873-74 (N.Y. Crim.Ct. 2004). *But see* ***United States v. Arnold***, 410 F.3d 895, 904 (6th Cir. 2005); ***Lopez v. State***, 888 So.2d 693, 700 (Fla.Dist.App. 2004); ***Moody v. State***, 594 S.E.2d 350, 354 n.6 (Ga. 2004); ***Pitts v. State***, 612 S.E.2d 1, 5 (Ga.Ct.App. 2005); ***People v. Victors***, 819 N.E.2d 311, 320-21 (Ill.App.Ct. 2004), *appeal denied*, 830 N.E.2d 8 (Ill. 2005); ***State v. Byrd***, 828 N.E.2d 133, 137 (Ohio Ct. App. 2005)

[9] No. 05-5705

[10] No. 05-5224

> **that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."**

Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006).

The Court noted its holding refers to interrogations because the statements in ***Hammon*** and ***Davis*** were the product of interrogations; however, the Court expressly recognized that the absence of interrogation does not necessarily mean statements are non-testimonial. The emphasis of the inquiry into whether statements are testimonial, are the statements themselves, not the interrogator's questions. ***Davis v. Washington***, 126 S.Ct. at 2274 n.1. The Court explained that the Confrontation Clause operates to bar only those statements obtained during police interrogations that are "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." ***Davis v. Washington***, 126 S.Ct. at 2276.

1. The *Davis* Case

The complainant (Michelle McCottrey), in ***Davis*** placed a 911 emergency call during an ongoing domestic dispute[11]. After providing identifying information concerning the perpetrator (Adrian Davis), Michelle told the

[11] The ongoing nature of the dispute was objectively apparent from Michelle's present tense description of the dispute. When the 911 operator asked "What's going on?" the caller replied, "He's here jumpin' on me again," and when asked by the operator if there were any weapons involved, the caller replied, "No. He's usin' his fists." As the call continued, the caller stated, "Martel. He's runnin' now." ***Davis v. Washington***, 126 S.Ct. at 2271-72

operator Adrian had "just run out the door" after hitting her and was leaving in a car with another person. ***Davis v. Washington***, 126 S.Ct. at 2272. When the police arrived, they observed Michelle had injuries which appeared to be fresh, was in a shaken state and frantically gathering her belongings and children in order to leave the residence. ***Id.***

In finding the statements made to the 911 operator to be non-testimonial, the Court noted the contrast between Michelle's interrogation by the 911 operator and Sylvia Crawford's interrogation. It was objectively apparent Michelle was involved in an ongoing dispute and describing events as they were actually happening. By contrast, Sylvia's interrogation took place hours after the events she described had occurred. Michelle's statements, objectively viewed, contained necessary information to resolve an ongoing emergency rather than to simply learn what had happened in the past[12]. Sylvia's statements, by contrast, recounted past events. The Court noted the formality of Sylvia's interrogation at the police station, consisting of calm responses to the interrogating questions while the interrogator was taping and making notes of the answers, contrasted with the caller's frantic answers provided over the phone in an environment that was not safe. ***Davis v. Washington***, 126 S.Ct. at 2276-77. These factors compelled the Court to conclude Michelle's interrogation objectively demonstrated her statements were a call for

[12] The Court characterized the inquiries by the operator, and Michelle's answers, concerning the perpetrator's identity as information necessary to resolve the emergency, i.e. non-testimonial, so that the responding officers would know if they were going to be confronting a violent felon upon arrival. ***Davis v. Washington***, 126 S.Ct. at 2277 *citing* ***Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.***, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)

help to meet the ongoing emergency. The Court stated Michelle was not acting as a witness, nor testifying, and what she said was not a weaker substitute for live testimony. ***Davis v. Washington***, 126 S.Ct. at 2277 *citing* ***United States v. Inadi***, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986).

The Court further clarified that an interrogation that begins as an emergency call for help can "evolve" into procured answers that are testimonial in nature once that emergency has ended, *e.g.* when Adrian left the house. ***Davis v. Washington***, 126 S.Ct. at 2277.

2. The *Hammon* Case

The Count found the determination of the nature of the statements obtained in ***Hammon*** through interrogation was a "much easier task." ***Davis v. Washington***, 126 S.Ct. at 2278. In ***Hammon***, police responded to a domestic disturbance involving Amy and Herschel Hammon. Upon arrival, the police found Amy alone, sitting on the porch appearing "somewhat frightened;" Amy told the responding officers nothing was the matter and gave them permission to enter the home. ***Hammon v. Indiana***, 829 N.E.2d 444, 446-47 (Ind. 2005). After entering the home, the police observed a damaged gas heating unit emitting flames from the front of the unit. Hershel was found in the kitchen and told the officers he and his wife had an argument, everything was fine now and the argument had never become physical. ***Id.*** at 447 The officers spoke separately with Amy and Hershel in separate rooms and prevented Hershel from being present when Amy was interrogated. Amy told the officer Hershel had broken the furnace, lamps and phone, shoved her into the glass from the

broken furnace, threw her down, tore up her van to prevent her from leaving, hit her in the chest, and attacked her daughter; she provided a written account of these events to the officer at his request. ***Davis v. Washington***, 126 S.Ct. at 2272.

The Court held the circumstances were objectively clear that the interrogation was part of an investigation into possible criminal past conduct. The officers admitted they were conducting an investigation, there was no immediate emergency in progress, there was no evidence the officers heard crashing or arguing when they arrived and saw no one throw or break anything. ***Id***. Amy's interrogation consisted of questions concerning what happened, not what was happening. Although Amy's interrogation was not as formal as the ***Crawford*** interrogation, the formality of Sylvia's interrogation merely strengthened the testimonial aspects of her statements; however, formality was not essential to the point. The Court concluded it was formal enough that Amy's interrogation was conducted separate and apart from Hershel with the officer asking questions for use in his investigation. ***Davis v. Washington***, 126 S.Ct. at 2272.

Objective facts relied upon to show the testimonial nature of Amy's statements given in response to interrogation included the active separation of Amy and Hershel during the interrogation; Amy "deliberately" recounting what had happened that evening in response to police questioning, and the interrogation producing the statements taking place after the events had already occurred. ***Id.*** These statements were an obvious substitute for live testimony because they do precisely what a witness does on direct examination and are inherently testimonial. ***Davis v. Washington***, 126 S.Ct. at 2278. The Court

further found sufficient formality was present in that lies to officers concerning alleged crimes are criminal offenses[13]. ***Davis v. Washington***, 126 S.Ct. at 2278 n.5

The Court did not hold that all questions at the scene of a crime will yield testimonial statements; it specifically excluded statements containing information which concerns the safety of the officers, such as whom they are dealing with, in order to assess the situation and possible danger to a potential victim. These types of exigencies may mean that "initial inquiries" produce non-testimonial statements; however, where the statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. ***Id.*** at 2279

C. The SOT Contentions

The SOT contends its petition for writ of certiorari (PWOC p. 12)[14] should be granted for the following reasons: (1) this Court has granted certiorari in similar cases, namely, ***Davis*** and ***Hammon*** (PWOC p. 6-12); (2) the state court of appeals failed to apply the objective witness test set out in ***Crawford*** to the circumstances

---

[13] **TEXAS PENAL CODE sec. 37.08 False Report to Peace Officer or Law Enforcement Employee** "(a) A person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to: (1) a peace officer conducting the investigation; or (2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation . . . "

[14] "PWOC" refers to the petition for writ of certiorari followed by the page number(s).

surrounding the procurement of the statements in this case (PWOC p. 12-13); (3) the state court erred in finding the statements in this case were testimonial (PWOC p. 13-26); and, (4) because the issues in this case compel further guidance from this Court (PWOC p. 26-30).

The ***Davis*** opinion was issued after the SOT had filed its PWOC; therefore, the cases cited in the SOT PWOC in support of their position are pre-***Davis*** and provide little support for the SOT contentions. This Court considered the SOT contentions in ***Davis*** and ***Hammon*** and decided the issues therefore, no legal issue is presented worthy of certiorari.

1. The Procured Statements In *Mason* Are Testimonial Because They Were Obtained During An Interrogation By A Police Officer And Recounted Past Events

The SOT asserts that whether an interrogation has taken place is dependent upon the number of questions asked by a government official, when the questions are asked and whether the questions were asked with "some degree of focus or concentrated purpose in a formal, solemn, systematic, or thorough manner, seeking details about a specific subject manner . . . that is being investigated." (PWOC p. 16) The SOT asserts one question, during the "initial, preliminary phase" of an investigation, does not amount to interrogation. (PWOC p. 16)

Because the SOT did not have the benefit of the guidance provided in ***Davis***, its focus is misplaced. Under ***Davis*** and ***Hammon***, statements made in the absence of any interrogation may be testimonial, ***Davis v. Washington***, 126 S.Ct. at 2273-74 n.1, while other statements made in

response to police questioning may be non-testimonial[15]. The focus of the inquiry is twofold: first, is the purpose of the interrogation solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator? If so, the product of such an interrogation, whether reduced to writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. ***Davis v. Washington***, 126 S.Ct. at 2276. Second, were the declarant's statements made while the events being described were actually happening or was the declarant describing past events? ***Id.*** If the declarant is speaking about events as they occur[16] during an ongoing emergency, and the statements elicited contained information necessary to resolve the ongoing emergency, then the product of the interrogation is non-testimonial. Therefore, it is the nature and content of the statements, not the questions asked, that is central in a **Sixth Amendment** analysis. ***Davis v. Washington***, 126 S.Ct. at 2273-74 n.1 With this focus in mind, the Court noted it is immaterial to the analysis whether the statements are elicited during the initial inquiries of government officials at the crime scene[17]. ***Davis v. Washington***, 126 S.Ct. at 2280.

---

[15] *See* ***Davis v. Washington***, 126 S.Ct. at 2279: **"Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, *see* 829 N.E.2d at 453-57, we do not hold the opposite – no questions at the scene will yield nontestimonial answers."**

[16] ***Davis v. Washington***, 126 S.Ct. at 2276 *citing* ***Lilly v. Virginia***, 527 U.S. 116, 137, 119 S.Ct. 1887, 144[L] L.Ed.2d 117 (1999) (plurality opinion)

[17] **"But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact**

(Continued on following page)

In both ***Davis*** and ***Hammon*** the questioning by the operator and the responding officers, respectively, were interrogations[18]. Reflecting the emphasis on the content of the statements in the analysis, ***Davis*** found sufficient formality in the police questioning to find interrogation in both cases and noted:

> **"The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood."**

Davis v. Washington, 126 S.Ct. at 2276 *citing* ***United States v. Stewart***, 433 F.3d 273, 288 (C.A.2 2006) (false statement made to federal investigators violate 18 U.S.C. sec. 1001); ***State v. Reed***, 2005 WI 53 prgph. 30, 280 Wis.2d 68, 695 N.W.2d 315, 323 (state criminal offense to knowingly give false information to an officer with the intent to mislead the officer in the performance of his or her duty).

---

that they were given at an alleged crime scene and were initial inquiries is immaterial."

[18] The Court repeatedly refers to the questioning in both ***Davis*** and ***Hammon*** as interrogations: *See, e.g.* ***Davis v. Washington***, 126 S.Ct. at 2276 (" . . . **The question before us in *Davis*, then, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements . . . ;**" " . . . **It is entirely clear from the circumstances that [Amy's] interrogation was part of an investigation . . . ,**" ***Id.*** at 2278; **"Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations . . . ")** ***Id.*** at 2274 n.1

a. The "Cry For Help"

The SOT further contends statements made during a "cry for help" are not testimonial and argued greater flexibility is required in the prosecution of domestic violence cases due to their very nature. (PWOC p. 20-22)

Davis decided this issue. The determination is an objective analysis which examines the content of the statements to determine if the purpose of the statement(s) is to enable police assistance to meet an ongoing emergency. Factors to be considered in this inquiry include whether the statements, objectively viewed, were in the nature of a cry for help against a bona fide physical threat; however, ***Davis*** did not decide a per se "cry for help" exception to the **Sixth Amendment**[19]. ***Davis v. Washington***, 126 S.Ct. at 2276

b. Excited Utterance

Crawford held where testimonial statements are concerned, the **Sixth Amendment** protections control over the vagaries of the rules of evidence. ***Crawford v. Washington***, 124 S.Ct. at 1370. Under ***Davis***, a declarant may still be under the stress of a startling event, but, if the declarant is no longer in danger and the emergency has passed, any statements she gives could still be testimonial.

---

[19] The Court noted Michelle spoke of events as they were occurring, was facing an ongoing emergency, her 911 call was a call for help against a bona fide physical threat, the nature of the questions by the operator, and Michelle's answers, were necessary to resolve the present emergency, and noted Michelle's answers were given over the phone from an unsafe environment. An objective review of the factors is applied.

If the statements are testimonial, the fact the statements fit the definition of an excited utterance does not defeat their testimonial nature. Whether a statement is an excited utterance, and therefore admissible as an exception to the hearsay rules, is not the initial inquiry. The State has the burden to show a statement is non-testimonial after timely objection by an accused. If the state meets its burden, then the State must show that the non-testimonial statement qualifies as an exception to the governing state hearsay rules[20]. To the extent the SOT argues that an excited utterance is never testimonial, that issue was decided against the SOT by ***Crawford*** and affirmed in ***Davis***.

2. The State Court Did Not Ignore The Circumstances Surrounding The Taking Of The Statements When It Found The Statements Were Made Under Circumstances Which Would Lead An Objective Witness Reasonably To Believe That The Statement Would Be Available For Use At A Later Trial

The SOT does not contest the test to be applied is an objective, not subjective, test under ***Davis*** and ***Crawford***

---

[20] *But see* ***Wall v. State***, 184 S.W.3d 730, 742 (Tex.Crim.App. 2006) *citing* ***United States v. Brito***, 427 F.3d 53, 61-62 (1st Cir. 2005)

> "These parallel inquiries require an ad hoc, case-by-case approach. An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance."

in a **Sixth Amendment** analysis[21]. (PWOC p. 12-13) The SOT contends the state court of appeals applied the test incorrectly in that the state court of appeals did not take into consideration the nature of the statements given by Henderson as a cry for help through an invocation of the police community care taking or public safety function, the significance of the excited utterance, and the dynamics of domestic violence. (PWOC p. 5-6)

a. The Significance Of The Excited Utterance

The state court of appeals noted it understood the state's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future proceedings. The state court rejected the use of subjective contemplation of the complainant and deemed it irrelevant based on ***Crawford***. ***Mason v. State***, 173 S.W.3d at 110 The court further noted, even if the state were correct, the subjective contemplations of the complainant could only be uncovered by cross-examination. ***Id.***

The state court of appeals looked to various cases considering the significance of the excited utterance in reaching its holding, ***Mason v. State***, 173 S.W.3d at 109-11, and held, after objectively reviewing the facts of the case and considering the case law, the statements made in this case were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. ***Id.*** at 111-12 The ***Mason*** court did not fail to consider the

[21] ***Crawford v. Washington***, 541 U.S. at 52.

excited utterance significance, it held against the State on the issue.

As is shown in section **II.** of this Brief, the state court of appeals holding was correct.

b. The Cry For Help And The Dynamics Of Domestic Violence

The SOT, on direct appeal, did not raise either of these theories in their brief to the state court of appeals; the SOT theory was the statements in this case were excited utterances. Further, the dynamics of domestic violence is not a consideration under ***Davis***. ***Davis v. Washington***, 126 S.Ct. at 2279-80. Had the SOT raised the cry for help theory, it is doubtful it would have prevailed. As is shown in section **II** of this Brief, any immediate danger or emergency had ended when Sarah was interrogated.

The state court of appeals applied the objective test correctly[22] when it found the statements in this case were testimonial, not only as the product of interrogation, but also as statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial based on the facts of this case. ***Mason v. State***, 173 S.W.3d at 111. Because the ***Davis*** Court has clarified how the objective test is applied to determine the testimonial nature of statements and because the state court of appeals held correctly, no legal issue is presented worthy of review.

---

[22] *See* section **II.** of this Brief.

II. Review Should Also Be Denied Because The Fifth District Court of Appeals Reached The Correct Result On The Facts Of The Case

A. The Lower Court Correctly Held The Statements In This Case Were The Product Of Interrogation And Were Made Under Circumstances, Objectively Considered, That Would Lead An Objective Witness To Reasonably Believe The Statement Would Be Available For Use At A Later Trial

Although the state court of appeals did not have the benefit of the ***Davis*** case when they issued their opinion, the court of appeals reached the correct conclusion. A ***Davis*** analysis of the facts of this case yields the same conclusions.

The facts of this case demonstrate the statements procured from Henderson were elicited during an interrogation conducted after any initial danger had passed. Further, the facts reveal the statements were elicited under circumstances that would cause an objective witness to reasonably believe the statements would be available for use in a subsequent prosecution. An objective view of the facts supporting these contentions are as follows:

1. Henderson spoke in the past tense about the alleged events.

2. Blasingame saw no indications of an ongoing struggle such as blood, torn clothing, loud arguing, crashing sounds, or any other signs of a struggle inside the home.

3. Mason was found in the bedroom and appeared to Blasingame to have been asleep. There is no evidence

Mason tried to prevent Henderson from calling the police, leaving the home, or answering the door when Blasingame arrived. Henderson remained in the home after the alleged assault although she had the opportunity to leave.

The record confirms the alleged assault ended before Henderson said she was calling the police[23]. Further, Henderson told Blasingame she and Mason had not been fighting or arguing before the alleged assault occurred and had been getting along okay. These facts indicate the alleged assault was of very short duration, began suddenly and ended abruptly.

4. Blasingame described Henderson's demeanor as upset, crying and mad. Persons under the immediate threat of an ongoing emergency are generally scared and fearing for their immediate safety. The emotion of anger at what has transpired generally does not occur until the person's safety is no longer at risk.

5. Blasingame admitted he was attempting to determine if an offense had *occurred*, what was going on, and why he was there. (RR 2 p. 12) He further admitted Henderson responded as to what had happened only after he asked what happened. (RR 2 p. 24)

---

[23] Any statements made during the 911 call, in this case, would not be non-testimonial as in ***Davis*** because there was no ongoing emergency situation. Although the record is not clear, it is reasonable to presume Mason went back to sleep after Henderson told him she was calling the police given her statements to Blasingame and Blasingame finding Mason sitting on the edge of the bed appearing to have been asleep. Mason notes the 911 call was not offered nor admitted into evidence.

6. Henderson gave a written account of what had allegedly happened that evening to Officer Grant, a Seagoville police officer[24].

7. Blasingame interrogated Henderson and Mason separately and apart from one another.

The foregoing facts objectively show Blasingame was conducting an investigation into possible criminal past conduct as in ***Hammon***. The facts objectively show there was no emergency in progress. Objectively viewed, the sole purpose of the interrogation was to investigate a possible crime.

Henderson deliberately recounted how the alleged offense began, progressed and ended to Blasingame in response to questioning after the events had ended and gave a written statement to Grant. These statements under official interrogation are an obvious substitute for live testimony because they do precisely what a witness does on direct examination; they are therefore, inherently testimonial. *See* ***Davis v. Washington,*** 126 S.Ct. at 2278.

The statements were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. Because the statements were made after any emergency situation had ended, it is more likely Henderson contemplated the legal ramifications of her statement[25]. Henderson's statement to Mason that she was

---

[24] Grant did not testify nor was the statement admitted into evidence.

[25] " . . . Generally statements made to police while the declarant (or another person) is still in personal danger are not made with consideration of their legal ramifications because the declarant usually speaks

(Continued on following page)

calling the police indicates she was reporting an alleged criminal offense, not seeking help, as was explained in this section of the Brief. She further gave a written account of the alleged events of the evening to Grant. These facts objectively show that a witness would reasonably believe the statements and the written account of the events as Henderson alleged them to be would be available for use at a later prosecution. Because the case was decided correctly under ***Davis*** and by the state court of appeals, no issue is presented worthy of certiorari.

III. Review Should Also Be Denied Because *Davis* Has Provided Significant Guidance In The Sixth Amendment Analysis In This Area Of The Law

The State contends this Court should grant its PWOC to provide useful guidance in the future in domestic violence cases. ***Davis*** was decided on June 19, 2006. The opinion clarifies and decides the issues raised in the SOT PWOC. Further, this case does not raise any new issues, nor does the SOT in their PWOC, that were not decided by the Court in ***Davis***. It would contribute little to nothing in this area of jurisprudence at this time if the SOT PWOC were granted. The direction this area of the law will take

---

out of urgency and a desire to obtain a prompt response; thus, those statements will not normally be deemed testimonial . . . But after the immediate danger has dissipated, a person who speaks while still under the stress of a startling event is more likely to comprehend the larger significance of his words: If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." ***Wall v. State***, 184 S.W.3d 730, 742 (Tex. Crim.App. 2006) *citing* ***United States v. Brito***, 427 F.3d 53, 62 (1st Cir. 2005).

after ***Davis*** can only be determined after the various state and federal courts have had an opportunity to apply the principles set out in ***Davis***.

Likewise, the SOT has requested review due to the similar facts of this case and ***Davis*** and ***Hammon.*** The similarities in these cases, and the Court's holding in ***Davis*** and ***Hammon,*** weigh in favor of denial of the PWOC for the immediately preceding reasons. For all these reasons, and those set out in this Brief, no issues are presented in this case worthy of certiorari.

CONCLUSION

The state court of appeals reached the correct decision in this case according to the principles set out in ***Crawford*** and ***Davis***. The issues raised in the SOT PWOC have been settled by this Court's holding in ***Davis.*** The ***Davis*** opinion has given us significant guidance in this area of the law to which the instant case would add, at best, very little. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

SCALA D. BYERS
LAW OFFICE OF SCALA D. BYERS
P.O. Box 496721
Garland, Texas 75049-6721
Telephone: 1/866/255-9795
Facsimile: 214/219-9309
Attorney for Respondent
Jett Jarvis Mason, Jr.